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IN THE
COURT OF APPEALS OF INDIANA

DAVID LONG,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0710-PC-890
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John Jay Boyce, Master Commissioner
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G01-9205-PC-72177

April 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Petitioner David Long challenges the post-conviction court's denial of his petition for post-conviction relief. Upon appeal, Long claims his appellate counsel rendered ineffective assistance by failing to argue that his sentence was manifestly unreasonable. We affirm.

FACTS AND PROCEDURAL HISTORY

Our opinion in Long's direct appeal instructs us as to the underlying facts leading to this post-conviction appeal:

> The facts most favorable to the verdict indicate that in May of 1992, Long, Craig Maxwell, Brent Smith, and Delfonso Hall were all living in the same apartment in Franklin, Indiana, rented in the name of David Long and paid for by him. Maxwell was seventeen years old, had run away from home, and was on probation. Long had devised a plan to sell drugs to meet the expenses of all the parties. He, Smith, and Hall were concerned that Maxwell's status could cause them problems. Long told Maxwell that he would have to find another place to live.
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> On May 18th, Hall suggested to Long and Smith that he shoot Maxwell. All agreed. After several discussions within the next twenty-four hours, Smith asked if he could do the shooting. Long and Hall agreed.
>
> On May 19, 1992, Long told Maxwell that the four men were going on a drug run. Long then drove them to Douglas Park in Indianapolis. Smith and Maxwell got out of the car; Long and Hall remained in the car. While driving around the park, Long heard four shots. Smith came back to the car and said that he had shot Maxwell. Smith, Long, and Hall returned to the apartment. There, they gathered up Maxwell's possessions, hid the gun used to shoot Maxwell, and put Maxwell's clothing in a dumpster. Early the next morning, a walker discovered Maxwell's body in Douglas Park in Indianapolis. Maxwell was dead of multiple gunshot wounds.
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> ***
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> Long . . . gave a tape-recorded statement to Detective Moore. In his statement, Long . . . described in great detail the events which resulted in Maxwell's death[.]
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> ***
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> Throughout his statement, Long consistently used "we" in referring to the planning of the murder and the disposal of the evidence. He stated that his motivation was his fear that Maxwell would jeopardize the trio's drug enterprise.

Long v. State, No. 49A02-9303-CR-146 (Ind. Ct. App. Feb. 27, 1995).

Following a jury trial, Long was convicted of murder and conspiracy to commit murder. The trial court sentenced him to two concurrent sentences of fifty years. In imposing this sentence, the trial court recognized the mitigators of Long's age and lack of criminal history but concluded they were sufficiently outweighed by the following aggravating circumstances to merit an enhanced sentence:

> That the circumstances of the crime show a need for corrective treatment in a penal setting. And the circumstances of the crime that I refer to are that the evidence showed that you believe the victim had become a nuisance to you and that you wanted to rid yourself and your co-conspirators wanted to rid themselves of this nuisance. You felt that the victim was a danger to your successfully running an [illicit] drug business. I find that another circumstance of the crime is that three of you discussed this plan off and on for weeks or so prior to the evening of the murder and that you committed the crime in a manner in which you attempted to conceal it, that is; driving the victim here to Indianapolis and not doing it in your own backyard but bringing him up here to a ghetto park hoping that it would look like it was a drug murder. I also find as a circumstance of the crime that shows that you need corrective treatment is that the victim was in a position of trust in his relationship with you, he considered you a friend and I give that great weight. I also believe that an imposition of a lesser sentence in this case would depreciate the seriousness of this crime because this was a killing of a seventeen-year-old young man who was adrift in the world, someone who had come to trust you. And I find an aggravating factor that you have continued to minimize your involvement in this crime. I do not believe that you had a fear of Brent Smith, in fact, I want to use a sports term here, Mr. Long, every day in this country American citizens are asked to "step up and protect other citizens" you couldn't do it and I find that that carries great weight. And you as much as admitted your involvement on the stand in this case I find that these aggravating factors outweigh the mitigating factors and I believe that a sentence above the presumptive is appropriate.

Petitioner's Exh. 1, p. 1096-98.

Long did not challenge his sentence in his direct appeal. With respect to the challenges Long did bring, this court determined that they were without merit and affirmed in *Long v. State*, No. 49A02-9303-CR-146 (Ind. Ct. App. Feb. 27, 1995).

On September 16, 2005, Long filed a *pro se* petition for post-conviction relief.[1] On April 23, 2007 Long moved to amend his petition. Following an evidentiary hearing on May 22, 2007, the post-conviction court denied Long's petition on September 5, 2007.[2] This appeal follows.

DISCUSSION AND DECISION

I. Standard of Review

In turning to Long's claim of ineffective assistance of appellate counsel, we are mindful that the petitioner bears the burden to establish his grounds for post-conviction relief by a preponderance of the evidence. *Godby v. State*, 809 N.E.2d 480, 481-82 (Ind. Ct. App. 2004) (citing Ind. Post-Conviction Rule 1(5)), *trans. denied*. Because the post-conviction court denied relief in the case at hand, Long is appealing from a negative judgment and faces the rigorous burden of showing that the evidence as a whole "'leads unerringly and unmistakably to a conclusion opposite to that reached by the [] court.'" *Id*. at 482 (quoting *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999) (quotation omitted)). We will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-

[1] Long does not include a copy of the chronological case summary in his Appendix as required by Indiana Appellate Rule 50(A)(2), so we rely upon the post-conviction court's recitation of the applicable dates in this case.

[2] The copy of the post-conviction court's order included in the Appellant's Appendix and Brief omits the court's conclusions in paragraphs 24 through 33.

conviction court has reached the opposite conclusion. *Id*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). We accept the post-conviction court's findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Id*.

The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel was deficient in her performance and that the deficiency resulted in prejudice. *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). To satisfy the first prong, the petitioner must show that counsel's performance was deficient in that counsel's representation fell below an objective standard of reasonableness and that counsel committed errors so serious that petitioner did not have the "counsel" guaranteed by the Sixth Amendment. *Id*. To show prejudice, the petitioner must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different. *Id*. The two prongs of the *Strickland* test are separate and independent inquiries. *Strickland*, 466 U.S. at 697. Thus, we may dispose of the ineffective assistance claim on the ground of lack of sufficient prejudice. *Id*.

II. The Merits

In order to establish his claim of ineffective assistance of appellate counsel, Long was required to establish that he was prejudiced by counsel's failure to challenge his sentence as manifestly unreasonable. At the time of Long's sentencing hearing, the presumptive sentence for murder was forty years, "with not more than twenty (20) years

added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances." *See* Ind. Code § 35-50-2-3(a) (1991). In addition, Indiana Appellate Rule 17(B), the applicable rule for sentencing review, provided at the time that "The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender." Rule 17(B) further provided that "A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed." This standard stands in marked contrast with the current standard, which grants appellate courts broader discretion to revise sentences deemed to be "inappropriate." *See Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005). Indeed, under the "manifestly unreasonable" standard, "'the issue is not whether in our judgment the sentence is unreasonable, but whether it is clearly, plainly, and obviously so.'" *Reed*, 856 N.E.2d at 1198 (quoting *Prowell v. State*, 687 N.E.2d 563, 568 (Ind. 1997)).

Apart from listing cases demonstrating what he alleges was a trend by the Indiana Supreme Court to modify sentences at the time of his appeal, Long fails to demonstrate how in his particular case, appellate counsel's claiming his sentence was manifestly unreasonable would have created a reasonable probability that this court would have agreed and modified his sentence accordingly. In sentencing Long to ten years above the presumptive sentence, which was ten years below the maximum, the trial court took note of the circumstances of the crime, specifically that Long had participated in the extended planning and execution of a murder in order to protect his drug business, that he had

sought to conceal his part in the crime by driving his victim to an Indianapolis "ghetto" to commit it, that he had minimized his responsibility for the crime, and that the victim was in a position of trust with him.[3] While Long appears to challenge the court's findings that he minimized his responsibility, in doing so he refers us to pages in the original transcript which are not part of the record before us. In any event, nothing from Long's planned participation in his friend's murder for purposes of protecting his own drug business suggests that his fifty-year concurrent sentences were clearly, plainly, and obviously unreasonable.[4]

Having found no prejudice, we find it unnecessary to address the claimed deficiency of counsel's performance.

The judgment of the post-conviction court is affirmed.

BARNES, J., and CRONE, J., concur.

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[3] Long does not specifically challenge the court's "depreciate the seriousness" aggravator, which may only be used to support the imposition of a presumptive sentence rather than an enhanced sentence. *See Cotto v. State*, 829 N.E.2d 520, 524 (Ind. 2005).

[4] Besides the cases he lists, without explanation, as demonstrative of a trend toward modifying sentences, Long also includes several cases in support of his argument, all of which we find inapplicable. In *Harrington v. State*, 584 N.E.2d 558, 565 (Ind. 1992), the Supreme Court determined that a defendant's maximum sentence for murder, justified only by the facts and circumstances of the crime, was unreasonable. Distinct from the defendant in *Harrington*, Long did not receive the maximum sentence, and his enhanced sentence was not based upon a single valid aggravator. In *Reed*, the Supreme Court took specific note of the high barrier for relief under former Appellate Rule 17(B) and did not award relief on this basis. 856 N.E.2d at 1198-99. In *Taylor v. State*, 840 N.E.2d 324, 340 (Ind. 2006), and *Duncan v. State*, 862 N.E. 322, 326-27 (Ind. Ct. App. 2007), *trans. denied*, the Supreme Court and this court found merit in the defendants' ineffective assistance of appellate counsel claims based upon their respective counsels' failure to challenge improper aggravators. Long makes no claim of improper aggravators in his appeal.

Long also refers to *James v. State*, 868 N.E.2d 543 (Ind. Ct. App. 2007) and *Long v. State*, 865 N.E.2d 1031 (Ind. Ct. App. 2007), *reh'g denied, trans. denied*, both of which address the question of whether a defendant's sentence is inappropriate under the current Indiana Appellate Rule 7(B) standard. Given the fact that the "manifestly unreasonable" standard is a stricter standard for evaluating sentences, we conclude these cases are inapposite to the instant challenge.